82-543

FILED
SEP 27 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF NORTH CAROLINA;
E.W. JONES, COMMANDER, NORTH CAROLINA STATE HIGHWAY PATROL;
JAKE ALEXANDER, SECRETARY, NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND HIGHWAY SAFETY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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DI CESARE - Printing — 331-8101 — Washington, D.C. 20006

QUESTIONS PRESENTED FOR REVIEW

I. DID THE COURT OF APPEALS DEPART FROM THE STANDARD ESTABLISHED BY THIS COURT WHEN IT AFFIRMED THE DISTRICT COURT'S HOLDING THAT THE RESPONDENT HAD ESTABLISHED A PRIMA FACIE CASE OF SEX DISCRIMINATION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 WHERE THE ONLY EVIDENCE THAT THE PETITIONERS' MINIMUM HEIGHT REQUIREMENT HAD A DISPARATE IMPACT ON FEMALES WAS INFERRED BY THE USE OF GENERAL POPULATION AND CIVILIAN LABOR FORCE STATISTICS WHICH WERE NOT SHOWN TO REPRESENT PERSONS WHO WERE OTHERWISE QUALIFIED AND AVAILABLE FOR THE JOB?

II. DID THE COURT OF APPEALS DEPART FROM THE STANDARD ESTABLISHED BY THIS COURT WHEN IT AFFIRMED THE DISTRICT COURT'S RULING THAT THE PETITIONERS DID NOT REBUT THE RESPONDENT'S PRIMA FACIE SHOWING OF DISPARATE IMPACT DISCRIMINATION?

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IN THE

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STATE OF NORTH CAROLINA;
E.W. JONES, COMMANDER, NORTH CAROLINA STATE HIGHWAY PATROL;
JAKE ALEXANDER, SECRETARY, NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND HIGHWAY SAFETY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners, State of North Carolina; E.W. Jones, formerly Commander; North Carolina State Highway Patrol; Jake Alexander, formerly Secretary, North Carolina Department of Transportation and Highway Safety, pray that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled cause on May 19, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit will not be published and is set forth in the Appendix at pages A-11 — A-12. The opinion of the District Court is reported at 512 F.Supp. 968 and is set forth in the Appendix at pages A-2 through A-8.

JURISDICTION

The court of appeals' Jugment was entered May 19, 1982. The petitioners moved for an enlargement of time in which to petition for rehearing until June 7, 1982. The motion for enlargement of time was granted and the petitioners thereafter filed a timely petition for rehearing on June 7, 1982. The petition for rehearing was denied on June 29, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). (Appendix p 14).

STATUTES AND REGULATIONS INVOLVED

This case involves Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq. and 29 C.F.R. 1600 et. seq. (Uniform Guidelines on Employee Selection Procedures).

STATEMENT OF THE CASE AND FACTS

On October 23, 1975, The United States (hereinafter respondent) filed a complaint in the United States District Court for the Eastern District of North Carolina, against the State of North Carolina, the Commander of the North Carolina State Highway Patrol and the Secretary of the North Carolina Department of Transportation and Highway Safety, (hereinafter petitioners). The respondent alleged the named petitioners had pursued and were pursuing practices which discriminated against blacks and women with

respect to employment opportunities in the North Carolina State Highway Patrol and that such acts and practices constituted a pattern and practice of resistance to the full employment rights secured by Title VII of the Civil Rights Act of 1964, as amended, the fourteenth amendment, and 42 U.S.C. §2000e-6(b) [§707(b) of the Civil Rights Act of 1964] and 28 U.S.C. §1345. A consent decree was entered on December 16, 1980, wherein the parties resolved all issues raised by the litigation except the validity of the North Carolina State Highway Patrol's 5'6" minimum height requirement for State troopers.

The respondent contended the minimum height requirement unlawfully discriminated against women. The petitioners contended the requirement was necessary for the safe and efficient performance of the job of trooper and thus job related. Following a two-day trial in February 1981, the district court found the petitioners' minimum height requirement had a substantial adverse impact on women, and that the petitioners had not established the requirement was job related. The court ruled from the bench on February 12, 1981 that the North Carolina State Highway Patrol's height requirement violated Title VII, and enjoined its further use. Judgment was entered the same day.

Subsequently, the district court prepared a written memorandum of opinion which is published at 512 F.Supp. 968. (Appendix pp A-2 - A-8). In the published opinion, the district court states that the respondent's evidence had established a prima facie case of discrimination under the standard established in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). This finding was based upon respondent's evidence in the form of general population statistics from the 1970 U.S. Census, which showed that the 5'6" height requirement

eliminated vastly more women ages 18-34 than men from consideration for employment as a North Carolina State Highway Patrol trooper. The district court next found that the petitioners had not presented sufficient evidence to rebut the inference of discrimination raised by respondent's prima facie case under the standard anounced in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In doing so the district court rejected the results of an empirical study offered by the petitioners and supportive expert testimony which concluded that their minimum height requirment was necessary for the safe and efficient performance of the job of North Carolina State Highway patrol trooper. Specifically, the evidence showed that because shorter troopers were more likely to be assaulted than taller troopers, the petitioners and their employees would suffer economic and psychological harm if the minimum height requirement was eliminated. The district court rejected the study and expert testimony finding:

> For a number of reasons, which go not only to the scope and methodology but also to the materiality of the study, ... it provides no evidence whatever that the height requirement is job related.

(Appendix p A-4).

The district court also rejected opinion testimony of troopers that height or stature was an advantage in job performance because:

> Such subjective evaluations have invariably been found inadequate to establish the job relatedness of physical requirements for law enforcement jobs.

(Appendix p A-6).

Petitioners filed a notice of appeal from the district court's judgment on March 19, 1981. Along with the notice of appeal, the petitioners filed a motion for stay pending appeal. The district court denied the motion for stay on April 1, 1981 and petitioners subsequently filed a similar motion with the United States Court of Appeals for the Fourth Circuit. That motion for stay was denied on June 1, 1981. Thereafter, the petitioners applied to this Court for a stay pending appeal. This Court denied the petitioners' motion on June 29, 1981.

The case was heard in the United States Court of Appeals for the Fourth Circuit on August 4, 1981 and decided on May 19, 1982. The court of appeals affirmed the judgment of the district court "On the basis of *United States v. Commonwealth of Virginia*, 620 F.2d 1018 (4th Cir. 1980) ... because North Carolina ' . . . did not demonstrate the need for . . . [the] physical requirement [. . .]' ". (Appendix p A-12).

The petitioners' petition for rehearing, filed on July 7, 1982, was denied by the court of appeals on June 29, 1982.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT COURT OF APPEALS DEPARTED FROM THE STANDARD ESTABLISHED BY THIS COURT WHEN IT AFFIRMED THE DISTRICT COURT'S RULING THAT THE RESPONDENT HAD, BY USE OF GENERAL POPULATION AND CIVILIAN LABOR FORCE STATISTICS ALONE, WHICH WERE NOT SHOWN TO REPRESENT PERSONS OTHERWISE QUALIFIED AND AVAILABLE FOR THE JOB, ESTABLISHED A TITLE VII PRIMA FACIE CASE OF DISPARATE IMPACT DISCRIMINATION.

The respondent presented no witnesses at trial in support of its prima facie case but merely relied upon stipulations by the petitioners and certain exhibits to establish the inference of unlawful discrimination. In the stipulations the petitioners admitted they imposed a 5'6" minimum height requirement on applicants for the position of North Carolina State Highway Patrol trooper; that only 0.5% of the persons hired as troopers between 1972 and 1980 were female; that according to the 1970 Census females comprised 50.0% of the population of the State of North Carolina between the ages of 20 and 34 (a category which roughly parallels the petitioners' minimum and maximum ages for initial employment); and that according to the 1970 Census, females comprised 41.3% of the civilian labor force of the State of North Carolina. Among the exhibits introduced by the respondent, one established that approximately 77.3% of the females in the United States' population between the ages of 18 and 34 were under 5'6" tall while approximately 9.4% of the males in the same age category were under 5'6" tall.

The petitioners challenged the sufficiency and accuracy of the respondent's statistically-based prima facie case by a motion to dismiss at the close of respondent's evidence. The motion was denied. In its memorandum of opinion the trial court explains its ruling as follows:

> The court has no difficulty in finding that the 5'6" height requirement has a substantial adverse impact on women. It operates so as to automatically eliminate 77.3% of women between the ages of 18 and 34 from consideration for employment as a highway trooper, as opposed to only 9.4% of men.

(Appendix p A-3).

The inescapable conclusion drawn from this statement is that the district court based its ruling that the respondent had established a prima facie case of discrimination solely on the statistical evidence before it. Specifically, the court found the petitioners' minimum height requirement to be discriminatory because fewer women than men in the nation's general population were 5'6" or more tall.

The question of whether general population and civilian labor force statistics which are not shown to represent persons who are otherwise qualified and available for the job are sufficient as a matter of law to establish a prima facie case of discrimination under the disparate impact theory was fully briefed and argued by the petitioners' in the court of appeals. However, the court of appeals, in affirming the ruling of the district court, made only a passing reference to this important question.

> The district court held invalid the 5'6" minimum height requirement for employment of the North Carolina Highway Patrol, essentially because the Highway Patrol had not presented any job analysis of the dozens or hundreds of different tasks performed by the Patrol and of the ability of people under 5'6" to perform them, *this case and the holding of the district court being based on the fact that many fewer women than men are 5'6" tall.*

(Appendix p A-12, emphasis added).

This court has established that a prima facie case of disparate impact discrimination may be inferred by the use of statistical data. *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975); *Griggs v. Duke Power Co.,* 41 U.S. 424 (1971). The court has further established that generalized national statistics can, in an appropriate

case, infer that a facially neutral hiring standard, such as a height requirement, acts to select applicants for hire in a discriminatory pattern. *Dothard v. Rawlinson*, 433 U.S. 321 (1977). However, the court has consistently cautioned that generalized statistics have little probative value in a discrimination case unless they accurately reflect the defendant's pool of qualified applicants. *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979); *Dothard v. Rawlinson, supra; Hazelwood School District v. United States*, 433 U.S. 229 (1977); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

The caution with which the court accepts generalized statistics is well-founded. Obviously, the effect an employment standard is perceived to have on a class of persons protected by Title VII depends entirely upon the figures to which an employee's hiring rate and work force composition are compared.

In this case the percentage of females hired by the petitioners and the percentage of females in their work force were compared to the percentage of females in the State's general population and its work force. The inference the courts below drew from this comparison and the respondent's statistical showing that fewer women in the national population than men were 5'6" or taller was that the petitioners' minimum height requirement was the cause of the disparity. However, the respondent's generalized state statistics did not take into consideration what percentage of the females in the state's population or labor force were both available and otherwise qualified for the job

offered by the petitioners. Both of these factors have been recognized as crucially important in defining the appropriate applicant pool to which an employer's hiring rate or work force composition is to be compared for the purpose of determining whether an employment standard causes disparate impact.

New York City Transit Authority v. Beazer, supra; Hazelwood School District v. United States, supra, at 307 n. 13. Because the respondent's generalized statistics did not take these factors into consideration, they cannot be said to represent the petitioners' relevant applicant pool. Thus, the inference of discriminatory disparate impact drawn from the comparison between those figures and the petitioners' hiring rate and work force composition has little if any probative value. The courts below erred in not requiring the respondent to show that the pool to which the petitioners' hiring rate and work force were compared consisted of people who were otherwise qualified and available for the job.

This deviation from the standards established by this court is even more glaring when considered along with the fact that the respondent presented no other evidence of discrimination by the petitioners. The function of statistical evidence in a disparate impact analysis is to create an inference that an employer's practice has an unlawful discriminatory effect on a class protected by Title VII. The usefulness of such an inference depends upon all of the surrounding circumstances. *International Brotherhood of Teamsters v. United States, supra.*

It is true that several courts of appeals have rejected defendants' arguments that statistical evidence alone cannot form the basis of a prima facie case. However, in most of those cases the plaintiff's prima facie case has

relied upon specific, relevant statistical evidence. In no case has a court of appeals held that general statistics could establish a prima facie case in the absence of some other evidence of discrimination by the defendants.

In all disparate impact cases in which this court has accepted the use of generalized statistics to establish a prima facie case of discrimination there also has been some other evidence to bolster the inference established by the statistics. In the case at bar, however, there was nothing to compliment or reinforce that inference. Thus, the initially weak inference established by the respondent's generalized statistical evidence that the petitioners' hiring practice was unlawful becomes even weaker.

This court and several courts of appeals have recognized that it is much easier to prevail on a discrimination claim under Title VII using the disparate impact theory than the disparate treatment theory. However, this Court should not allow a court of appeals to further lessen the plaintiff's burden to establish a prima facie case by condoning a method of proof in which only generalized statistics are used.

There is obviously a need for this Court to settle the question of whether a prima facie case of disparate impact discrimination can be established by the use of generalized statistics alone. A definitive statement from this Court on the accepted methods of proving disparate impact under Title VII would be of great benefit to employers, applicants for jobs and those agencies tasked with enforcing the law. This Court is now presented with a case which allows it to render an opinion on that narrow issue alone. The question is one of sufficient substance and importance to warrant review by this Court.

II. THE FOURTH CIRCUIT COURT OF APPEALS DEPARTED FROM THE STANDARD ESTABLISHED BY THIS COURT WHEN IT AFFIRMED THE DISTRICT COURT'S RULING THAT THE PETITIONERS DID NOT REBUT THE RESPONDENT'S PRIMA FACIE SHOWING OF DISPARATE IMPACT.

Over the years this Court has devised a general framework for allocating proof in a Title VII disparate impact case dealing with hiring practices. First, the plaintiff must carry the initial burden of establishing a prima facie case. He does this by establishing that an employer's hiring practice has a disparate impact on a group protected by Title VII. *Griggs v. Duke Power Co., supra.* If the plaintiff carries this burden, the employer may meet it by showing that his employment practice is necessary to safe and efficient job performance, *Dothard v. Rawlinson, supra,* at 331 n. 14, or that it is job related, *New York City Transit Authority v. Beazer, supra; Griggs v. Duke Power Co., supra.* Finally, where the employer meets this burden, he will prevail unless the plaintiff shows that there are alternative procedures which serve the employer's legitimate needs while creating a lesser discriminatory impact on the protected class. *Albemarle Paper Co. v. Moody, supra.*

The courts of appeals all followed this Court's direction and place the ultimate burden of persuasion in disparate impact cases upon the plaintiff. However, a conflict has developed among the courts of appeals as to what burden the defendant must assume in step two of the disparate impact theory allocation of proof. The conflict is over whether the employer bears the burden of persuasion or the burden of proof.

The issue has become even more confused since this Court's decision in *Texas Department of Community*

Affairs v. Burdine, 450 U.S. 248 (1981). In that case the Court held that a defendant in a disparate treatment case could rebut a plaintiff's prima facie showing of discrimination simply by articulating some legitimate nondiscriminatory reason for its employment action. However, the courts of appeals have reached conflicting opinions as to whether the rule announced in *Texas Department of Community Affairs v. Burdine, supra*, is also to be applied to a defendant's burden in a disparate impact case.

It appears that the second, fifth, eighth, tenth and eleventh circuits have limited the decision in *Texas Department of Community Affairs v. Burdine, supra*, to cases tried under the disparate treatment theory. *Teal v. State of Connecticut*, 645 F.2d 133 (2nd Cir. 1981); *Johnson v. Uncle Ben's, Inc.*, 657 F.2d 750 (5th Cir. 1981); *Taylor v. Teletype Corp.*, 648 F.2d 1129 (8th Cir. 1981); *Coe v. Yellow Freight Systems, Inc.*, 646 F.2d 444 (10th Cir. 1981); *Jackson v. Seaboard Coastline Railroad Co.*, 678 F.2d 992 (11th Cir. 1982). However, the third, sixth, ninth and District of Columbia circuits have either specifically decided or implied that the *Burdine* rule is applicable in disparate impact cases as well as disparate treatment cases. *NAACP v. Medical Center Inc.*, 657 F.2d 1332 (3rd Cir. 1981); *Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251 (6th Cir. 1981); *Contreras v. City of Los Angeles*, 656 F.2d 1276 (9th Cir. 1981); *Thompson v. Sawyer*, 678 F.2d 257 (D.C. Cir. 1982); *Metrocare v. Washington Metropolitan Area Transit Authority*, 679 F.2d 925 (D.C. Cir. 1981). Thus, those circuits require that the defendant in a disparate impact case only articulate some legitimate nondiscriminatory reason for its employment practice in order to show its job relatedness.

The case at bar gives the Court the opportunity to address this issue specifically. The petitioners rebutted the respondent's prima facie case with both an empirical study and opinion testimony from employees which supported the position that the petitioners' minimum height standard was necessary to the safe and efficient operation of their business. The empirical study was rejected by the courts below for a number of reasons including the "methodology" used. (Appendix p A-3 - A-4). There can be no doubt that this reference is reflective of the courts' opinion that any empirical study as to the business necessity or job relatedness of the petitioners' minimum height requirement had to be conducted in strict compliance with the standards of test validation set out in the *Uniform Guidelines Employee Selection Procedures*, 29 C.F.R. 1600, et. seq. It is the court's further opinion that the study failed to meet those standards. Even if the Court's opinion that a nontest employment standard has to be validated pursuant to the Guidelines is correct, which the petitioners deny on the basis of 29 C.F.R. 1607.6 (Appendix p A-19), the empirical study along with the supportive expert and opinion testimony from employees is certainly an articulation of some legitimate nondiscriminatory reason for their hiring practice. Thus, if the petitioners' contention that the *Burdine* standard applies in disparate impact cases is correct, the court below erred in finding the petitioners had not rebutted the respondent's prima facie case. The conflict among the courts of appeals as to the proper burden to place upon a defendant who attempts to rebut a prima facie case of disparate impact is likely to continue without a definitive statement by this Court. This is a question of sufficient importance and substance to warrant review by this Court.

CONCLUSION

Clearly, therefore, the apparent conflict of the decision of the court of appeals with this Court's previous decisions, the unclear, confusing and conflicting interpretations by the courts of appeals of *Texas Department of Community Affairs v. Burdine, supra,* and the compelling policy considerations directed to establishing clearer guidelines for all litigants in present and future Title VII disparate impact cases combine to present questions of sufficient substance and importance to warrant review by this Court. Upon the foregoing, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
VS.

STATE OF NORTH CAROLINA, et al,
Defendants,

CIVIL ACTION NO.
75-0328-CIV-5

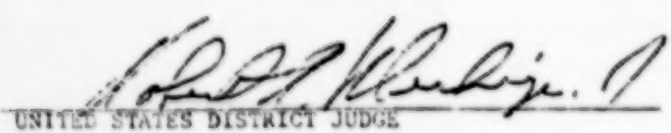
ORDER

For the reasons this day stated from the bench and deeming it just and proper so to do, it is ADJUDGED and ORDERED as follows:

1. The 5'6" minimum height requirement currently maintained by the North Carolina Highway Patrol be, and the same is hereby declared to be invalid and of no force and effect; and

2. The North Carolina Highway Patrol, its Patrol Commander, its agents, employees, servants and all acting in concert therewith be and they are hereby enjoining from applying or enforcing the aforesaid 5'6" minimum height requirement in considering applicants for employment with the said Highway Patrol.

Let the Clerk send a copy of this order to all counsel of record.



UNITED STATES DISTRICT JUDGE

Date: 2/12/81

Filed
April 20, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

Civil Action No.
75-0328-CIV-5

STATE OF NORTH CAROLINA, et al.,
Defendants.

MEMORANDUM

This action was brought in 1975 by the United States against the North Carolina Highway Patrol, alleging a pattern and practice of race and sex discrimination in employment, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* To the credit of the parties, all issues have been resolved by consent decree, with the exception of defendant's 5'6" minimum height requirement for state highway patrol officers, which plaintiff alleges illegally discriminates against women. The matter was tried on February 11 and 12, 1981. In a ruling from the bench, the Court found the requirement violative of Title VII, and enjoined its further use by the defendant. At that time, the Court reserved the right to prepare more detailed, written findings, and now deems it appropriate to do so in light of the fact that defendant has filed a notice of appeal.

The Patrol has, over the past twelve years, gradually reduced its minimum height requirement from 5'10" to 5'6".[1] Until April 1980, the Patrol also had a minimum weight requirement, but now only requires that weight be proportional to height. Additionally, applicants must pass a physical agility and strength test.[2]

The first step in determining the legality of a facially neutral employment criterion such as that in issue here

goes to whether plaintiff has made a prima facie case. *Albermarle Paper v. Moody,* 422 U.S. 405 (1975). A showing that the criterion has a substantial adverse impact on a class protected by Title VII is sufficient to make out such a case, and to shift the burden of justifying the requirement to the defendant. *Dothard v. Rawlinson,* 433 U.S. 321 (1977). The Court has no difficulty in finding that the 5'6" height requirement has a substantial adverse impact on women. It operates so as to automatically eliminate 77.3% of the women between the ages of 18 and 34 from consideration for employment as a highway trooper, as opposed to only 9.4% of men. As of December 15, 1980, there was only one female trooper in the Patrol, out of a force numbering 1,131.

Defendant sought at trial to show that the disparate impact of the height requirement is far less substantial than would appear from the bare numbers by introducing rather convoluted statistical evidence, based on applicant data, which purported to show that women have only one-tenth the propensity that men have to apply for law enforcement jobs. The Court finds this suggestion spurious. As the Supreme Court noted in *Dothard,* the use of applicant data to draw inferences about the level of interest among women in law enforcement is highly questionable. 433 U.S. at 330. *See Blake v. City of Los Angeles,* 595 F.2d 1367, 1375 (9th Cir. 1979). As defendant's witness on this point acknowledged, the conclusion, from such data, that women are significantly less interested than men in law enforcement work depends on the assumption, which the Court believes to be erroneous, that women are not dissuaded from pursuing whatever interest they may have in such work by the history of male domination and sex discrimination in law enforcement.

A prima facie case having been made, the burden falls on the Patrol to justify the requirement. *Griggs v. Duke Power*, 401 U.S. 424 (1971). At the outset, the Court notes that defendant has never prepared a validation study, or a formal job analysis, to justify the past or current height requirements. Instead, defendant relies on two types of evidence: expert testimony purporting to show that shorter troopers are more likely to be assaulted than taller troopers; and the opinion testimony of troopers that stature is an advantage in job performance.

Defendant's survey concerning assaults was drawn primarily from forms on which the Patrol requires troopers to report assault incidents.[3] The survey, which covered a five year period, excluded both those officers who were not employed over the entire period, and those who had more than twelve years of experience with the Patrol. The remaining troopers were broken into two groups: those under 5'11", and those 5'11" and over. The report indicated that the shorter group was more likely to be assaulted than the taller group. For a number of reasons, which go not only to the scope and methodology but also to the materiality of the study, the Court finds that it provides no evidence whatever that the height requirement is job related.

First, defendant's report examined the *likelihood* of assault: *i.e.*, the probability that officers of various heights would be assaulted at all in a given year. Plaintiff presented a statistical study which showed, by contrast, that there is *no* relationship between height and *rate* of assault: *i.e.*, how frequently, on an average, troopers of various heights are assaulted. To the extent that the Patrol is concerned about assault, both by reason of the economic costs incurred when a trooper is disabled by assault,[4] and by reason of concern for the safety of its officers, it is, in the Court's view, the average rate of assaults on officers of various heights, rather than the

probability of officers of different heights ever being assaulted, which is material.

Secondly, the Court notes that the likelihood of assault is only one factor, and the sole factor which defendant has been able to correlate with height. There are undoubtedly myriad factors as important to adequate performance as ability to avoid assault (just as there are, surely, dozens of factors other than height which bear on the likelihood of assault). In the absence of a job analysis, it is impossible to gauge the importance of defendant's findings in the broader context of overall job performance.

Thirdly, entirely apart from the question of whether assault rate or likelihood of assault is the more relevant factor, the Court questions the relevance of a finding relating height to likelihood of assault using a breakpoint of 5'11". The issue before the Court is whether a 5'6", and not a 5'11", height requirement is job related. Given the many factors which may influence the likelihood of assault, it simply cannot be inferred that whatever relationship may exist at a breakpoint of 5'11" would hold true for a breakpoint of 5'6". Additionally, the fact that the study did not include a single woman makes any inferences from the study to the job relatedness of the requirement as applied to the adversely impacted class even more tenuous.

Finally, the Court finds it difficult to resist the conclusion that the entire issue of assault is an afterthought, developed by defendant in an attempt to provide some empirical evidence of job relatedness. The Patrol never conducted a study on height and assault rate in its force in considering whether to lower previous minimum height requirements. Further, while the assault rate on troops varies a great deal among geographic areas, the Patrol gives no consideration to

height in assigning troopers to areas with high assault rates.

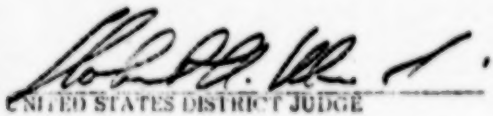
The second type of evidence with which the Patrol sought to justify the requirement was the testimony of troopers. Tall troopers testified that they believed their stature was an advantage; shorter troopers testified that they believed their relative lack of stature to be a disadvantage. The Patrol contends that height is one factor which, along with innate and acquired skills such as demeanor, body language, and eye contact, enables an officer to establish a "command presence", or a slightly intimidating aspect, in dealing with members of the public. Such subjective evaluations have invariably been found inadequate to establish the job relatedness of physical requirements for law enforcement jobs. *See Craig v. City of Los Angeles*, 626 F.2d 659, 667 (9th Cir. 1980); *Horace v. City of Pontiac*, 624 F.2d 765, 768 (6th Cir. 1980). Just as there are numerous factors bearing on the likelihood of assault, there are doubtlessly numerous factors, many of them subtle, bearing on a trooper's ability to maintain an aura of authority: the most important, perhaps, being the uniform that he or she wears. it is further noteworthy that the officer responsible for trooper training testified that shorter troopers can be trained to become just as proficient in defensive tactics as taller troopers.

While the notion that height is positively related to job performance in law enforcement has a certain intuitive plausibility, the assumed relationship has proven in this case, as in many others,[5] to have no factual foundation. It is precisely such artificial barriers, based on unexamined and stereotypical notions, which have for so long precluded equal opportunity for women in

traditionally male areas of endeavor, and which Title VII is intended to eliminate.

Having concluded that the challenged height requirement discriminates against women in violation of Title VII, an injunction barring its use must issue.

An appropriate order shall issue.



UNITED STATES DISTRICT JUDGE

Date: 4/17/81

[1] The requirements over that period have been as follows:

Nov. 1968 - Nov. 1973	5'9"	160 pounds
Dec. 1973 - Oct. 1977	5'8"	150 pounds
Nov. 1977 - March 1980	5'6"	130 pounds
April 1980 - Present	5'6"	weight proportional to height

[2] Defendant should be on notice that physical ability tests which disproportionately exclude women must be shown to be job-related under Title VII. *Harless* v. *Duck*, 619 F.2d 611 (5th Cir. 1980).

[3]The definition of assault used by the Patrol is much broader than assault as generally understood in the context of criminal law. Virtually any injury sustained by a trooper while in contact with or in pursuit of a suspect or member of the public, is characterized as an assault.

[4]Defendant presented evidence concerning work day lost and compensation paid as a result of assaults. Because of a number of significant inaccuracies and miscalculations in defendant's exhibit

on this point, the Court is unable to give it any weight. However, the Court has no doubt that work days lost by reason of assaults are expensive and are legitimately a matter of concern to the defendant.

[5]The Court notes that no state or metropolitan police agency has, to date, successfully demonstrated the job relatedness of a minimum height requirement in a Title VII challenge. *E.g. Blake* v. *City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979); *Horace* v. *City of Pontiac*, 624 F.2d 765 (6th Cir. 1980); *United States* v. *Commonwealth of Virginia*, 454 F.Supp. 1077 (E.D. Va. 1978); *United States* v. *City of Buffalo*, 457 F.Supp. 612 (W.D.N.Y. 1979), *aff'd.* 633 F.2d 643 (2d Cir. 1980); *United States* v. *City of Chicago*, 411 F.Supp. 218 (N.D. Ill. 1976).

4CCA 28
(Rev. 9-79)

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

May 19, 1982

TO: W. Dale Talbert, Esq.
Isaac T. Avery, III, Esq.

Jessica Dunsay Silver, Esq.
Louise A. Lerner, Esq.

NOTICE OF JUDGMENT

Judgment was entered in Case No. 81-1313 this date. The Court's opinion is enclosed.

Petition for Rehearing (FRAP 40)

Filing Time A petition may be filed within 14 days after judgment. *No extension will be granted save for the most compelling reasons.* Requests based on grounds such as miscalculation of time or a need to consult with others will be peremptorily denied.

Purpose A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.
2. A change in the law which occured after the case was submitted and which was overlooked by the panel.
3. An apparent conflict with another decision of the Court which is not addressed in the opinion.

The filing of a petition in order merely to reargue the case is an abuse of the privilege.

Statement of Counsel *A petition shall contain an introduction stating that, in counsel's judgment, one or more of the situation exist as described in the above "Purpose Section". The points to be raised shall be succinctly listed in the statement. Lacking such a statement, the petition will be returned to counsel without filing.*

Form The 15 page limit allowed by the Rule shall be observed. The Court requires 15 copies of the petition; however, a pro se party who is indigent may file the original only.

Bill of Costs (FRAP 39)

Filing Time A party to whom costs are allowed, who desire taxation of costs, shall file a bill of costs within 14 days after judgment.

Mandate (FRAP 41)

Issuance Time The mandate is issued 21 days after judgment. A timely petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. If a stay of mandate is sought, only the original of a motion need be filed.

WILLIAM K. SLATE, II
CLERK

Enclosure

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNPUBLISHED

No. 81-1313

UNITED STATES OF AMERICA
Appellee

v

STATE OF NORTH CAROLINA, *et al*
Appellants

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Robert R. Merhige, Jr., District Judge.

Argued August 4, 1981 Decided May 19, 1982

Before RUSSELL, WIDENER and HALL, Circuit Judges.

Isaac T. Avery, III, Special Deputy Attorney General; W. Dale Talbert, Assistant Attorney General (Rufus L. Edmisten, Attorney General of North Carolina, on brief) for Appellants; Louise A. Lerner, Department of Justice (James P. Turner, Acting Assistant Attorney General; Jessica Dunsay Silver, Department of Justice, on brief) for Appellee.

PER CURIAM:

The district court held invalid the 5'6" minimum height requirement for employment of the North Carolina Highway Patrol, essentially because the highway patrol had not presented any job analysis of the dozens or hundreds of different tasks performed by the patrol and of the ability of people under 5'6" to perform them, or of the ability of women to perform them, this case and the holding of the district court being based on the fact that many fewer women than men are 5'6" tall. The issue tried was a culmination of years of litigation between the government and the State, all other issues in the case having been settled by an agreed order effective July 1, 1981.

The government acknowledges that some height requirement would be valid, and also acknowledges that even the height requirement in effect may be valid, but it contends it is not valid on this record.

On the basis of *United States v. Commonwealth of Virginia*, 620 F.2d 1018 (4th Cir. 1980), see esp. p. 1024, we affirm the judgment of the district court because North Carolina ". . .did not demonstrate the need for . . . [the] physical requirement [. . . .] . . . Id. p. 1024. If the State is able to demonstrate the need for the physical requirement, taking into account the myriad tasks undertaken by its highway patrol, it may be able to establish a factual underpinning for a height requirement, and our opinion does not prevent the reimposition of such a requirement at some future time.

But upon the record in this case, the judgment of the district court is *AFFIRMED.*

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-1313

UNITED STATES OF AMERICA
Appellee

v.

FILED
JUNE 29, 1982

STATE OF NORTH CAROLINA, *et al*
Appellants

ORDER

We have considered the petition for rehearing and are of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Russell and Judge Hall.

For the Court

28 U.S.C. § 1254

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

42 USC § 2000e-2

§ 2000e-2. Discrimination because of race, color, religion, sex, or national origin.

(a) Employers. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such invidual's race, color, religion, sex, or national origin.

(b) Employment agency. It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or

refer for employment any individual on the basis of his race, color, religion, sex or national origin.

(c) Labor organization. It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs. It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Religion, sex, or national origin as bona fide occupational qualification; educational institutions with employees of particular religions. Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], (1) it shall not be an unlawful employment

practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organization. As used in this title [42 USCS §§ 2000e et seq.], the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) National security. Not withstanding any other provision of this title [42 USCS §§ 2000e et seq.], it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merity system; ability tests. Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], it shall be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action

upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be unlawful employment practice under this title [42 USCS §§ 2000e et seq.] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)) [29 USCS § 206(d)].

(i) Preferential treatment to Indians living on or near reservation. Nothing contained in this title [42 USCS §§ 2000e et seq.] shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not required on account of numerical or percentage imbalance. Nothing contain in this title [42 USCS §§ 2000e et seq.] shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title [42 USCS §§ 2000e et seq.] to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an impalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed agency or labor organization, admitted to membership or classfied by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or

percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

29 C.F.R. § 1607.6

§ 1607.6. Use of selection procedures which have not been validated.

A. Use of alternate selection procedures to eliminate adverse impact.

A user may choose to utilize alternative selection procedures in order to eliminate adverse impact or as part of an affirmative action program. See section 13 below. Such alternative procedures should eliminate the adverse impact in the total selection process, should be lawful and should be as job related as possible.

B. Where validity studies cannot or need not be performed.

There are circumstances in which a user cannot or need not utilize the validation techniques comtemplated by these guidelines. In such circumstances, the user should utilize selection procedures which are as job related as possible and which will minimize or eliminate adverse impact, as set forth below.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit upon the person indicated below by depositing a copy of same in the United States mail, first-class postage prepaid, addressed to the following:

Mr. Rex E. Lee
Solicitor General
Department of Justice
Washington, D.C. 20530

This the 27th day of September, 1982.

RUFUS L. EDMISTEN
Attorney General

Isaac T. Avery

Isaac T. Avery, III
Special Deputy Attorney General

W. Dale Talbert

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Office - Supreme Court, U.S.
FILED
NOV 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-543

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF NORTH CAROLINA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-543

STATE OF NORTH CAROLINA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, the State of North Carolina and certain of its officials, seek review of the invalidation of a minimum height requirement for state troopers employed by the North Carolina Highway Patrol (NCHP) on the ground that it violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. IV) 2000e *et seq.*, by discriminating against women. This case presents no novel issue of law or fact, but rather is one of many throughout the country in which lower courts, applying the standards articulated by this Court in Title VII disparate impact cases, have invalidated similar requirements of other state and local agencies.[1] Accordingly, this Court's review is not warranted.

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[1]See, e.g., *Horace* v. *City of Pontiac*, 624 F. 2d 765 (6th Cir. 1980); *United States* v. *Commonwealth of Virginia*, 620 F. 2d 1018 (4th Cir.), cert. denied, 449 U.S. 1021 (1980); *Blake* v. *City of Los Angeles*, 595 F. 2d 1367 (9th Cir. 1979), cert. denied, 446 U.S. 928 (1980); *LeBoeuf* v.

1. The district court (Pet. App. A-2 to A-8) properly applied this Court's standards in determining that the NCHP's 5'6" minimum height requirement has a substantial adverse impact on women (*id.* at A-3); that petitioners failed to demonstrate any relationship between the challenged height requirement and job performance as a state trooper with the NCHP (*id.* at A-4 to A-6); and that the height requirement therefore discriminates against women in violation of Title VII (*id.* at A-7). See *Connecticut* v. *Teal*, No. 80-2147 (June 21, 1982), slip op. 5-6; *Dothard* v. *Rawlinson*, 433 U.S. 321, 329 (1977); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431-432 (1971). The court of appeals, in an unpublished per curiam opinion (Pet. App. A-11 to A-12), affirmed the judgment of the district court "upon the record in this case" (*id.* at A-12), noting that petitioners failed to "demonstrate the need for * * * the physical requirement" (*ibid.*). The court cautioned, however, that its opinion did not preclude reimposition of a minimum height requirement for state troopers if in the future petitioners are able to establish "a factual underpinning" for such a requirement (*ibid.*).

2. Petitioners challenge the United States' use of general population statistics in establishing the adverse impact on women of the NCHP's height requirement (Pet. 5-10) and the burden of proof assigned to them on their defense of job-relatedness (*id.* at 11-13). Neither challenge has merit.

a. This Court has upheld the use of general population statistics in establishing a prima facie case of disparate

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Ramsey, 503 F. Supp. 747 (D. Mass. 1980); *Vanguard Justice Society, Inc.* v. *Hughes*, 471 F. Supp. 670 (D. Md. 1979); *United States* v. *City of Buffalo*, 457 F. Supp. 612 (W.D.N.Y. 1978), modified and aff'd, 633 F. 2d 643 (2d Cir. 1980).

impact attributable to the use of a minimum height requirement where, as here, the evidence "on its face conspicuously demonstrates [the] * * * requirement's grossly discriminatory impact."[2] *Dothard* v. *Rawlinson, supra*, 433 U.S. at 331. Similarly, this Court has upheld the use of general population statistics when the job skills required are skills "that many persons possess or can fairly readily acquire." *Hazelwood School District* v. *United States*, 433 U.S. 299, 308 n.13 (1977). In accordance with its prior decisions in *United States* v. *Commonwealth of Virginia*, 620 F. 2d 1018, 1025 (4th Cir.), cert. denied, 449 U.S. 1021 (1980), and *EEOC* v. *Radiator Specialty Co.*, 610 F. 2d 178, 185 (4th Cir. 1979), the court of appeals in this case affirmed the district court's reliance on the United States' general population statistics (Pet. App. A-3, A-12) in the absence of any showing by petitioners that the "dozens or hundreds of different tasks" performed by state troopers require any special skills not generally possessed or readily acquired (*id.* at A-12). Petitioners have never identified any such skills and do not now direct this Court's attention to any special qualifications required for the position of state trooper. Accordingly, the lower courts' reliance on general population statistics rather than on specially qualified work force statistics was entirely proper.[3]

---

[2]A 5'6" minimum height requirement eliminates 77.3% of women between the ages of 18 and 34, as opposed to 9.4% of men in that age group (Pet. App. A-3).

[3]The district court's rejection of petitioners' applicant flow data as not indicative of the level of interest among women in law enforcement positions (Pet. App. A-3) was also consistent with this Court's prior decisions. See *Dothard* v. *Rawlinson, supra*, 433 U.S. at 330-331; *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 365-367 (1977). In any event, the data rejected by the district court do not advance petitioners' case. To give but one example, the district court noted that petitioners offered a study purporting to show that women have only one-tenth the propensity to apply for law enforcement positions as men (Pet. App. A-3). Assuming, arguendo, that

b. Petitioners also assert (Pet. 11-12) that a conflict among the circuits has arisen since this Court's decision in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 254-255 (1981), a disparate treatment case, as to the burden borne by the defendant in rebutting a prima facie disparate impact case. It is doubtful, however, that such a conflict can survive this Court's decision in *Connecticut* v. *Teal, supra*, slip op. 5-6, in which the Court expressly reaffirmed its pre-*Burdine* analysis of disparate impact cases. In our view, the clear import of the Court's disparate impact cases, both before and after *Burdine*, necessarily requires that a defendant do more than "articulate" (Pet. 6, 12) a defense of job-relatedness.

In any event, even application of the standard petitioners propose would not change the result here, because the district court found that the evidence showed "no factual foundation" for petitioners' assertion that the NCHP's minimum height requirement is job-related (Pet. App. A-6). The court of appeals agreed, noting that the height requirement lacks a "factual underpinning" (*id.* at A-12).[4] These evidentiary evaluations raise no issue worthy of review by this Court.

---

petitioners' study was valid, petitioners are still left with the facts that only 0.5% of the persons hired as NCHP troopers between 1972 and 1980 were female (Pet. 6), and that as of December 15, 1980, only one out of 1,131 NCHP troopers was a woman (Pet. App. A-3). Petitioners' hiring record is thus sufficiently close to "the inexorable zero," *International Brotherhood of Teamsters, supra*, 431 U.S. at 342 n.23, as to negate any attack on the United States' use of more generalized population statistics.

[4]The district court, in rejecting petitioners' theory of job-relatedness as without factual foundation, indicated that it appeared to be "an afterthought, developed * * * in an attempt to provide some empirical evidence of job relatedness" (Pet. App. A-5).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1982

DOJ-1982-11